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Judaism as a Religious Legal System

By ELLIOT DORFF*

Introduction

AMERICANS are accustomed to thinking about Judaism as a religion, comprised primarily of beliefs and moral maxims. Judaism is a religion; it does espouse beliefs and norms of behavior, but it includes much more. As Mordecai Kaplan has suggested, Judaism is best described as a civilization because Jewish identity involves attachment to a specific land, language, literature, music, art, and people, in addition to beliefs and morals.¹ The religion is the core of the civilization because it gives all the other elements their distinctly Jewish character, but it is not the totality of what it means to be Jewish.

The fact that Judaism is a religious civilization is important for two reasons. First, along with the specific attachments identified by Kaplan, Judaism includes a body of law. In fact, this body of law is central to the meaning of Judaism. The centrality of law becomes clear when one notes that the rules which govern Jewish life all require that Jews do specific things and refrain from doing others, not that they believe one thing or another. There are beliefs that characterize mainstream Judaism, but Jews have expressed and interpreted them in a wide variety of ways, and no set of dogmas ever has become authoritative. Jewish law, on the other hand, is detailed in its demands, and its observance traditionally has been considered essential to having an identity as a Jew. Thus, if a committed Jew were asked to identify the essence of the Jewish faith, his answer probably would begin with a discussion of the specific

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1. See generally M. KAPLAN, *JUDAISM AS A CIVILIZATION* (1957); M. KAPLAN, *QUESTIONS JEWS ASK: RECONSTRUCTIONIST ANSWERS* (1956).

practices it requires and then describe its association with a specific people, land, and history. Mention of the beliefs that logically undergird those practices and associations would follow. This description is in sharp contrast to that which most likely would be given by a Christian because the most important element of the Christian faith is the belief that Jesus is the Savior. That belief requires appropriate behavior, but Christian beliefs are described with much more specificity than Christian behavioral requirements. Furthermore, a Christian cannot achieve salvation by works alone. For the Jew, however, observance of the law is central, and consequently development of the law is something naturally to be expected.

The second reason that the nature of Judaism as a religious civilization is important is the opposite of the first. Because Jewish law developed in a religious context, many features of its methodology, content, transmission, and motivational structure have been influenced significantly by religious concepts and concerns. In other words, although Judaism is not just a religion, it is not just a legal system either; it combines religion and law and gives both a higher priority than it ascribes to the other elements of the Jewish civilization. Moreover, Judaism seeks to integrate religious sensibilities into the legal structure as fully as possible. This integration makes the law the major vehicle for the expression of those sensibilities and makes religion the foundation for law and the medium through which it operates. Consequently, studying the relationship between religion and law in Judaism is crucial to an understanding of what is central to Judaism and also to an analysis of how religion and law can interact when their symbiosis is taken seriously.

This study of Jewish law is divided into three sections in this Article. The first two discuss the theoretical aspects of the relationship between religion and law in Judaism, and the last studies their interaction in practice. The first part explains why Judaism is a legal system like all other legal systems, despite its religious elements. The second part delineates the ways in which the Jewish legal system nevertheless remains a religious legal system. Finally, the third part describes the practical effects that the Jewish religion has on Jewish law.

I. Judaism as a Legal System

The Christian influence on American thought makes it difficult for Americans to conceive of Judaism as a legal system. That factor,

however, is not the only one that makes such conception difficult. Several features of Jewish law seem to disqualify it as a legal system in the commonly accepted understanding of that term. For example, the *Bible* claims that Jewish law was initiated by God at Sinai amidst thunder and lightning, and it speaks of Moses and other prophets who added to that law by speaking to God, often in rather eerie circumstances.² These events certainly do not resemble the normal legislative process by which human beings create and extend the law. Moreover, under Jewish law, an omniscient God, as well as human judges,³ renders judgments and enforcement of those judgments is not restricted to the remedies that human beings impose. An omnipotent God, who controls nature and history, uses His powers to provide an inescapable mechanism of enforcement for His laws.⁴ Thus, in all three aspects of law, legislative, judicial and executive, Jewish law seems to be a peculiar legal system.

Jewish law certainly is different from nonreligious systems of law in a number of respects, but it is also remarkably similar to all other legal systems in a number of important ways. Jewish law is most similar to secular law in the subject matter that it covers. Judaism includes regulations that normally would be characterized as religious, such as ritual and family laws.⁵ Large segments of Jewish law, however, cover subjects that ordinarily are considered secular. These subjects include a whole range of civil, criminal, and even agricultural matters, such as laws governing personal injuries, landlord-tenant relations, bailments, theft, the planting of crops, irrigation, and court procedures.

Jewish law also resembles secular law in its enforcement procedures. Judaism assumes that God will act as the ultimate enforcer, but Jewish law does not hesitate to use remedies imposed by human authorities. These remedies have varied in form with changes in time and location and have included such measures as compensation, fines, excommunication, lashes, and death. The parties who executed these punishments also have varied. When Jews ruled themselves, the leaders of the community appointed judges and officers to enforce

2. See *Exodus* 19:20; *Leviticus* 24:10-23; *Numbers* 15:32-36, 27:1-11; *Jeremiah* 17:19-27.

3. See, e.g., *Isaiah* 11:1-6; *Psalms* 7:9-12; 35:23-24; *Ecclesiastes* 3:17.

4. See *Leviticus* 26; *Deuteronomy* 28.

5. Family matters, however, have increasingly come under state regulation in the last century.

the law. During the periods of Persian, Roman, Arab, and Polish rule, governmental bodies compelled Jews to obey the rulings of the Jewish courts. For about the last thousand years, however, the Jewish community did not enjoy autonomy or the support of the secular government in executing its laws. Still, the community remained a cohesive body and was able to enforce the law on its own.⁶

The most important way in which Jewish law resembles secular law is in its methodology. In light of Biblical materials, this claim may seem untenable, but it is valid.

The *Bible* says that the *Torah*⁷ is God's Command and that human beings may not alter it in any way.⁸ In other words, the law cannot be changed or extended by legislation. The *Bible* does, however, provide two ways to amend Biblical law. One is prophecy. God can and does continue to speak to human beings, and His words must be heeded. The other is judicial interpretation; in chapter 17 of *Deuteronomy*, God requires that each generation address its questions about the law to the judges of that generation, and whatever the judges decide is conclusive.

Judaism is not identical to the religion of the *Bible*, however, and Jewish legal methodology is not identical to Biblical methodology. Judaism is based upon the way the Rabbis of the *Talmud*⁹

6. Cf. L. FINKELSTEIN, *JEWISH SELF-GOVERNMENT IN THE MIDDLE AGES* (1964); M. Elon, *Mishpat Ivri*, in 12 *ENCYCLOPAEDIA JUDAICA* 124-29, 137-45.

7. The *Torah* consists of the first five books of the Old Testament.

8. *Deuteronomy* 4:2, 13:1.

9. The *Talmud* is the authoritative body of Jewish law and tradition and was developed after the close of the *Torah* around 400 B.C. It consists of the *Mishnah* and the *Gemara*. The *Mishnah* is the body of legal decisions compiled by Rabbi Judah, the President of the Sanhedrin (Jewish Supreme Court), in 220 A.D. References to it consist of tractate (book), chapter, and law, for example, *Shabbat* 3:1. The *Gemara* is the record of both legal and nonlegal discussions and extensions of the *Mishnah* that took place in Israel between 220 and 400 A.D. and in Persia between 220 and 500 A.D. There are therefore two *Talmuds*: the Palestinian (or Jerusalem) *Talmud*, consisting of the *Mishnah* and the *Palestinian Gemara*; and the *Babylonian Talmud*, consisting of the *Mishnah* and the *Babylonian Gemara*. Later Jewish law is based primarily on the *Babylonian Talmud*, and *The Talmud* usually refers to this text. Consequently, citations to the *Babylonian Talmud* usually consist simply of the tractate followed by the number and the side of the folio page in that tractate, for example, *Shabbat* 69a. Citations to the *Palestinian Talmud* begin with *P.T.* or *T.J.* (*Talmud Yerushalmi*=*Jerusalem Talmud*) followed by the tractate, page, and column in the edition that has two columns on each side of a folio page, for example, *P.T. Shabbat* 69d. Alternatively, because no edition of the *Palestinian Talmud* has become standard, citation may be only to the text of the *Mishnah* upon which the *Gemara's* comment is

and *Midrash*¹⁰ interpreted the *Bible*. Consequently, Jewish legal methodology is the Rabbinic methodology, and the differences between it and Biblical methodology make the operation of Jewish law very similar to that of a secular legal system.

The first difference in methodology results from the Rabbis' claim that revelation ceased shortly after the destruction of the First Temple.¹¹ They even denied authority to revelations claimed by members of their own sect.¹² Because prophecy had served in Biblical times as a source of new laws and interpretations¹³ and because the *Torah* prohibited legislative amendments to the law, the Rabbis needed to find other ways of adapting the law to new circumstances. Accordingly, they greatly expanded the judicial powers created by the *Torah* in chapter 17 of *Deuteronomy* and claimed that God only speaks to mankind through their interpretations of the law.¹⁴ The Rabbis thus clearly and consciously shifted the operation of the law from the prophets to the judges and from revelation to interpretation.

based, for example, *P.T. Shabbat* 3:1. For a list of Talmudic tractates and further information on the *Talmud*, see *Talmud, Talmud, Babylonian*, and *Talmud, Jerusalem*, 15 *ENCYCLOPEDIA JUDAICA* 750-79.

10. "Midrash" means interpretation, and the term usually refers to the body of interpretations of the *Bible* given by the Rabbis during the Talmudic period. Their interpretations of legal sections of the *Bible* are called *Midrash Halakhah*; their interpretations of the nonlegal sections of the *Bible* are called *Midrash Aggadah*. Because the latter are considerably more extensive than the former, *The Midrash* is used to refer to the *Midrash Aggadah*.

The *Midrash Halakhah* and the *Talmud* are not the same. The *Midrash Halakhah* is arranged according to the order of the *Bible*, and it consists exclusively of Rabbinic comments during the Mishnaic period (roughly 400 B.C.-220 A.D.). In contrast, the *Talmud* includes legal and nonlegal material from the entire Talmudic period (400 B.C.-500 A.D.) and is organized according to subject. Its organization has made the *Talmud* easier for a judge to use. Consequently, it enjoys greater legal authority than the *Midrash Halakhah*. In matters of belief, Judaism allows considerable freedom, and so a *Midrash* that deals with nonlegal matters is not as authoritative as a statute or judicial decision, even if the particular *Midrash Aggadah* happens to be included in the *Talmud*. Nevertheless, all of this Rabbinic material is important for an understanding of Judaism in general and Jewish law in particular because it was the Rabbis of the *Talmud* and *Midrash* who gave Judaism its distinctive cast.

For a list of the collections of *Midrash* and further material on *Midrash Halakhah* and *Midrash Aggadah*, see 11 *ENCYCLOPEDIA JUDAICA* 1507-23.

11. Cf. *Sanhedrin* 11a and *Numbers Rabbah* 14:4 (proscribing additions to the 24 books of the *Bible*).

12. *Bava Metzia* 59b.

13. See generally *Leviticus* 24:10-23; *Numbers* 15:32-36; 27:1-11; *Jeremiah* 17:19-27; *Nehemiah* 13:14-21.

14. *Bava Batra* 12a.

Why did the Rabbis substitute interpretation for prophecy? Part of the reason undoubtedly lies in the problems inherent in using prophecy. One of these problems is evident in the *Bible's* struggle to create a method of distinguishing between true prophets and false ones.¹⁵ Finding such a method also was a continuing problem for the Rabbis, especially in the light of the many people who claimed to be prophets in their time.

If prophecy is accepted, the problem is mutability of the law. God conceivably could announce completely new rules through a prophet, or at least a prophet could claim that He had done so. Accepting prophecy, therefore, spells legal chaos.

The change from prophecy to interpretation was also motivated by the Rabbis' conviction that the *Torah* needs interpretation, that even the accepted revelation in the *Torah* cannot stand alone because it is ambiguous.¹⁶ Moreover, interpretation is necessary because Jewish law needs to retain sufficient flexibility.¹⁷ Indeed, the Rabbis considered new interpretations and expansions of the law not only necessary, but also desirable.

Finally, human interpretation and application of the law is necessary because God required it in chapter 17 of *Deuteronomy*. Not to interpret the law anew in each generation would be to disobey God's Law.¹⁸

For all of these reasons, then, the Rabbis abandoned revelation and relied exclusively on interpretation. Because each generation adds its own interpretations, however, the question arises as to how there can be any coherence or consistency in the law using the interpretative methodology. This question is difficult, but the Rabbis faced it squarely, answering it in three ways. First, the tradition would remain coherent despite the many variations of opinion because the interpretations all derived from God.¹⁹ Notwithstanding the variations in interpretations of the Rabbis, they are still interpretations of one document, the *Torah*, and, as such, they will be cohesive because God, the Author of that document, may be presumed to be consistent.

15. *Deuteronomy* 13:2-6, 18:9-22.

16. *Numbers Rabbah* 14:4.

17. *P.T. Sanhedrin* 22a.

18. *Pesikta Rabbati* 7b (Friedmann, ed.).

19. *Numbers Rabbah* 14:4.

Second, the tradition will be cohesive because there is a sense of continuity within the tradition. There is a famous story in the *Talmud* that illustrates this point. When Moses visited the academy of Rabbi Akiba, who lived some 1400 years after him, he did not even understand what Rabbi Akiba was saying (let alone agree with it). Nevertheless, Moses was comforted when Rabbi Akiba cited one of the new laws in Moses' name because that indicated that there was a sense of continuity in the tradition, however much it had changed in form.²⁰ This sense of continuity can be maintained only if those who have studied the tradition carry on its spirit and substance in new settings. The tradition, however, must be studied well. The Rabbis knew only too well the consequences of trusting the law's coherence to those who did not know it thoroughly: "When the disciples of Shammai and Hillel multiplied who had not served (studied with) their teachers sufficiently, dissensions increased in Israel, and the *Torah* became like two *Torahs*."²¹ Nevertheless, the Rabbis were convinced that the continuity and consistency that they sensed were real and that the law in its present form, however different from the *Torah*, was the direct extension of it: "Moses received the *Torah* from Sinai and handed it down to Joshua, and Joshua to the elders, and the elders to the prophets, and the prophets handed it down to the men of the Great Assembly."²²

The third reason Jewish law would retain its coherence is that it includes a way of making decisions. For example, the *Bible* provides for the appointment of judges with varying powers,²³ and Rabbinic literature depicts a well-developed system of courts composed of three judges who handled civil matters and twenty-three judges who decided capital cases.²⁴ Thus, Jews had courts wherever they lived,²⁵ including a system of appeal to a supreme court called the Sanhedrin.²⁶

Even when the Sanhedrin ceased to exist and there no longer was a central authority in Judaism, Jewish courts continued to func-

20. *Menahot* 29b.

21. *Sotah* 47b.

22. *Avot* 1:1; see also *Exodus Rabbah* 47:1.

23. *Exodus* 18; *Numbers* 11; *Deuteronomy* 1:9-18; *Ezra* 7; *Nehemiah* 8.

24. *Sanhedrin*, ch. 1, 11:2-4; *Sotah* 1:4.

25. See note 28 *infra*.

26. *Tosefta Sanhedrin* 7:1; *Sifre* II, 152; *Sanhedrin* 88b; *P.T. Sanhedrin* 4:1; see Silverstein, *The Right of Appeal in Talmudic Law*, 6 CASE W. RES. J. INT'L L. 33-41 (1973).

tion, so that the continuity of Jewish law was preserved. Thus, in certain periods, Jewish communities were sufficiently organized to have had a centralized court system. These court systems existed during the time of the Sanhedrin, and during the Middle Ages when there were synods of rabbis and community leaders who made far-reaching decisions for much of European Jewry. They also exist today for sections of world Jewry that have authorized specific bodies of rabbis to make decisions in Jewish law on their behalf.²⁷ When no such centralized authority existed, each community followed the decisions of its local rabbi and the court he often chaired.²⁸

Because Jews have lived in many different situations all over the world, that the court in each community makes decisions appropriate to its particular setting is probably a good thing. Jewish law thereby gains the necessary flexibility to enable it to work in many different times and places. Nevertheless, the existence of a clear way of making decisions wherever Jews live, together with the sense of continuity and the dependence upon one *Torah*, gives Jewish law coherence and a reasonable degree of consistency.

The Rabbis explicitly claimed that human judges in each generation have the authority to make decisions in Jewish law and that God no longer has the right or authority to do so.²⁹ Therefore, with all of the various interpretations of the law and the new applications of it, how is it in any sense divine? The Rabbis clearly wanted to retain divine authority for Jewish law. Rabbis in each generation, however, had to assert their right to interpret or apply the law, but there was no simple way of affirming both the divine authority of the law and the right of human beings to interpret it.

In order to solve this dilemma, the Rabbis, as was typical of them, asserted two propositions. On the one hand, they claimed that all later developments in the law were originally revealed at Sinai.³⁰ Because all of the interpretations, extensions, and revisions

27. See STANDARDS OF SYNAGOGUE PRACTICE OF THE UNITED SYNAGOGUE OF AMERICA, art. I (1957, revised 1961, 1969, 1971, 1975), according to which "The United Synagogue of America recognizes the Committee on Jewish Law and Standards of the Rabbinical Assembly . . . as its authority on Jewish law" and the rabbi of each congregation as the authorized interpreter of its decisions. Other Jewish communities with authorized decision making bodies also exist today in Israel and Great Britain.

28. Each community is commanded to establish a court. *Tosefta Sanhedrin* 3:10; cf. *Makkot* 7a.

29. See note 12 *supra*.

30. *Berakhot* 5a; *P.T. Peah* 17a.

of the law by the Rabbis of all generations to come already were revealed at Sinai, they are imbued with divine authority. On the other hand, the Rabbis were aware that many of their interpretations and laws were new,³¹ and they held that it is God's desire that the Rabbis create new laws in each generation.³² Moreover, they claimed that God revealed His will through these new interpretations.³³

How is it possible that everything was revealed at Sinai and yet new things are revealed each day? Actually, the situation is not as contradictory as it may seem, as those trained in the law will readily recognize. On the one hand, with the exception of the last sixteen amendments, the Constitution of the United States is the same as it was in 1791, when the Bill of Rights was ratified. Its meaning, however, has been extended far beyond the probable intentions of its framers, because judges, lawyers and scholars have carefully examined its every phrase in applying it to new problems and circumstances. Its meaning has changed a number of times when the Supreme Court has reversed itself or greatly narrowed the application of previous rulings. Yet, in an important sense, all of the later developments were inherent in the original Constitution because they all are derived from the governmental bodies that it created and the general principles that it established. The Constitution is understood and applied in many novel ways each year, or in more theological terms, many new, previously undiscovered meanings and applications are revealed over time. All of the new meanings, however, are dependent upon the Constitution which originally set up the structure for those interpretations and applications.

A similar analysis can be applied to Jewish law. On the one hand, every interpretation and application of Jewish law that has ever been, is, or will be made already was revealed at Sinai. They were revealed at Sinai because every one of them comes directly or indirectly from the procedures and principles embodied in the Jewish constitution, the *Torah*. Even revisions that Rabbis have made over the centuries are based upon the authority the *Torah* gives the judges to act on behalf of Jewish law in every generation. The revisions may represent a change in the content of the law, but they are nevertheless part of Jewish law because they were enacted by its duly authorized representatives.

31. See notes 12 & 20 *supra*.

32. See note 17 & accompanying text *supra*.

33. See note 14 *supra*.

Similarly, and more importantly, each time a Jewish court or judge decided to interpret the *Torah* or *Talmud* in one way and not another, the meaning of those texts changed. Through this process of interpretation, or *Midrash*, the texts sometimes were given meanings they never before had. Sometimes, however, several possible alternative lines of interpretation were cut off by this process. In any case, whether a given verse in the *Torah* was being expanded or contracted in meaning or application, this process was possible only because the *Torah* established the ground rules and procedures of Jewish law. On the other hand, in every generation the *Torah* is given new meanings and applications, and in that sense "matters that had not been revealed to Moses were revealed to Rabbi Akiba and his colleagues."³⁴ The authority of Jewish law does not diminish, then, as it is applied anew in every generation. It must be so interpreted and applied if it is to continue to live, and the Rabbis clearly recognize this fact.

So far, the importance of interpretation has been seen in what the Rabbis said. This importance is even more evident, however, in what the Rabbis did. By using the methods of exegesis³⁵ that they had developed, the Rabbis totally annulled some Biblical laws and created new ones. An example is their treatment of capital punishment. The *Bible* requires capital punishment for a whole variety of offenses. The Rabbis, however, created procedures for capital cases similar to the practice in American law of advising an accused of his constitutional rights. These procedures were so demanding it became virtually impossible to obtain a capital conviction under Jewish law. One of the procedures they instituted required that the culprit be warned by two witnesses immediately before committing the act that it was unlawful and carried the death penalty. The reason for this procedure was that the wrongdoer might not have known the act was illegal or would be punished so severely, and therefore he could not be put to death for transgressing a law of which he was unaware. Another requirement was that the accused respond, "Even so, I am going to do it." This response would assure that the warning had been heard. Still another requirement was that the act be committed within three seconds after

34. *Numbers Rabbah* 19:6; see also note 20 *supra*.

35. These methods are contained in the *Baraita of Rabbi Ishmael*, SIFRA, Introduction. For a good translation and explanation of these rules, see P. BIRNBAUM, *THE DAILY PRAYERBOOK*, 41-46 (1949).

the warning was heard; otherwise, the law might have been forgotten and therefore the accused could not be held responsible. Finally, the witnesses must not have been related to each other or to the culprit, and at least one judge on the court must have voted to acquit. The reason for the vote of acquittal was to show that the court was not prejudiced against the accused.

Some of the requirements, as the Rabbis certainly knew, are implausible extensions of principles that are reasonable in a different form. The Rabbis, however, had decided to outlaw the death penalty despite the numerous times the *Bible* required it, and they used the procedures to accomplish their purpose. Thus, the Rabbis interpreted the death penalty out of existence.

The Rabbis of the *Talmud* clearly and consciously changed Jewish law, adding a number of laws, dropping some, and changing the forms of others. They did not take their responsibility lightly, but they modified the law in many of the same ways that the lawyers and judges of nonreligious legal systems do. Thus, the methodology used by the Rabbis resembled that of judges and legislators in nonreligious legal systems.

So far this Article has discussed the Jewish and the secular law as those systems are found in the writings of rabbis, lawyers, and judges. In both Jewish and secular law, however, many decisions are not made by the officials of the legal system but rather are determined by the customs of the people. Judges and lawyers of any legal system may not be completely comfortable with customary practices, and they may resent the fact that the scope of their own authority is diminished when decisions are made by reference to customs. Nevertheless, the law always is determined by both the officials designated to make such decisions and the customs of the people who agree to accept their authority.

This symbiosis has important methodological consequences for both Jewish and secular law because it means that law and custom must be adjusted to each other periodically. This adjustment takes many forms and extends in both directions.

To see how law and custom adjust to one another, a distinction must be drawn between custom and usage. The term "usage" describes the common practices of the people. On the other hand, the term "custom" describes rules that have evolved from common usage. Because those rules are often enforced, they may exert the same au-

thority as laws or judicial decisions. Therefore, "usage" is a purely descriptive term, while "custom" is partly prescriptive.

When law and custom interact, law is sometimes the active partner. If a law or precedent exists, there is no need for the added authority of custom, but laws and judicial decisions sometimes do affect custom and thereby establish usages. For example, some, but not all, states allow motorists to turn right on a red light. Recently, New Jersey, Wisconsin, and other states have enacted legislation permitting such turns and have thereby created a new driving practice in those states. Conversely, laws and judicial decisions can function to abrogate both usages and customs. For example, the Supreme Court's integration decisions have uprooted longstanding usages and customs in many areas of the United States in addition to overturning a variety of laws and decisions. Thus, it no longer is common usage among advertisers to picture white people exclusively, and the unwritten rules (customs) prohibiting friendships between blacks and white also have been set aside.

Influence may be exerted in the opposite direction; custom also may define the nature and authority of the law. The most prevalent, and hence the most important examples, are the numerous laws that codify longstanding customs³⁶ or that simply defer to custom.³⁷ In such cases the law must be adjusted to custom rather than custom to the law. More dramatic illustrations of how custom defines the law occur when custom effectively annuls laws by making them unenforceable. The most famous example in American law is Prohibition, when even a constitutional amendment could not change popular social practice.

Thus, law can establish usages, and custom can produce law or operate in its place. Law also can uproot customs and customs can nullify laws.

The same interaction between law and custom occurs in Jewish law. The law determines custom when there are no previously existing conventions or when practices exist that officials find objec-

36. See, e.g., U.S. CONST. amend. XXII (prohibiting more than two presidential terms).

37. Such customs are to be distinguished from situations in which the law allows the parties to create their own conditions, as in commercial contracts or arbitration agreements. In the latter, the law gives legal effect to obligations voluntarily assumed by the individuals involved; in the former, the litigants are bound by common custom, just as they would be if the custom were enacted into law.

tionable. As in American law, when Jewish law determines custom in the absence of convention, rarely is it considered an interaction between law and convention. It nevertheless is such an interaction because the practices of the members of a society are inevitably influenced by that for which they can be held accountable in court. For example, Talmudic legislation concerning marriage had a significant influence upon common practice. For one thing, it transformed the bride price from a sum that the groom had to pay at the time of marriage into a lien against his property in the event of divorce or his death. This change encouraged marriage by removing the economic barrier and, at the same time, changed the assumptions and rules governing a man's ability to divorce his wife.³⁸

The influence of law on custom is more apparent when a law abrogates a custom. Menaohem Elon lists four situations in which the law as interpreted by the Rabbis had this effect: (1) when the customs were founded on an erroneous understanding of the law; (2) when the customs were deemed unreasonable because they imposed undue hardship on others or were deemed illogical because they acted contrary to the purposes of the actual law; (3) when the customs were bad; and (4) when the customs were contrary to fundamental rules of Jewish law.³⁹ The ability of the law to abrogate customs and usages has varied according to the power and prestige the Rabbis have enjoyed in various times and places. For example, modern rabbis are having a difficult time convincing Jews to observe the dietary laws, even though failure to do so is a clear violation of Jewish constitutional law. Whether successful or not, however, Rabbis have acted in opposition to accepted usages and customs, and Elon provides many examples of such action in all four categories.⁴⁰

The most important interaction between law and custom, if only because it is often ignored, is the way in which custom influences Jewish law. This influence occurs most often when custom functions in the absence of law. The *Jerusalem Talmud* specifically recognizes this function when it discusses whether it is necessary to set aside tithes from fruit trees in their fourth year: "When there is no clearly established law on any matter before the court and you do not know

38. H. SCHAUSS, *THE LIFETIME OF A JEW* 142-45 (1950).

39. M. ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 760-67 (1973) (in Hebrew); M. Elon, *Minhag* in 12 *ENCYCLOPAEDIA JUDAICA* 23-25.

40. See note 39 *supra*.

what its true nature is, go and ascertain the custom of the people and act accordingly, and we see that the public does not set aside tithes in this case."⁴¹ Later Jewish law codes applied this principle broadly, often by simply recording the common practice. Consequently, customs govern much of Jewish civil and ritual practice.

Jewish legal authorities differ as to why customs are authoritative in the absence of law so that their violation is punishable. Some authorities claim that customs are merely laws that were enacted long ago but are no longer recognized as such.⁴² This view gives custom latent juridical authority. Others claim that the authority is divine, as in the famous statement of Hillel the Elder, when asked to rule on a question concerning the paschal sacrifice: "Leave it to Israel! If they are not prophets, they are still the children of prophets."⁴³ Most scholars claim that customs are authoritative in secular matters because Jewish law permits the parties to a transaction to agree to their own conditions. Jewish law thus defers to custom in those areas with the effect of making the custom the law.⁴⁴

Customs also serve to decide what the law is when the legal authorities differ. When customs act in this way, however, they are in effect acting in the absence of law, because in some areas of Jewish law, when the jurists disagree, there effectively is no law. This situation does not arise in American law because there are definite methods for reconciling such disputes, but such methods have not existed in many periods of Jewish history. Both the *Babylonian* and *Jerusalem Talmuds* record instances when conflicts between laws were settled by the rule, "Go check the practice of the people."⁴⁵ In post-Talmudic times, most Rabbis followed the rule that in disputes about Biblical law the more stringent view was to be followed but that, if the dispute concerned Rabbinic legislation, the more lenient rule prevailed.⁴⁶ That rule, however, was set aside when there existed

41. *P.T. Peah* 7:6, 20c; see *P.T. Ma'aser Sheni* 5:3, 56b.

42. *P.T. Shabbat* 17a, 19:1; *Soferim* 14:18; *Comments of Mordekhai to Bava Metzia* 366; *Responsa of the Rosh* 55:10.

43. *Pesahim* 66a.

44. *Responsa of the Rosh* 64:4; *Responsa Rashbah* 562; *Responsa Meharasham, Hoshen Mishpat*, 380; see M. Elon, *Contract*, in *ENCYCLOPAEDIA JUDAICA*; M. Elon, *Mispat Ivri*, in *ENCYCLOPAEDIA JUDAICA*.

45. *Berakhot* 45a; *Eruvin* 14b; *P.T. Peah* 7:6, 20c; *P.T. Ma'aser Sheni* 5:3, 56b; *P.T. Yevamot* 7:2, 8a.

46. E.g., MAIMONIDES, *MISHNEH TORAH*, Book of Judges, *Laws Concerning Rebels*, Chapter I, Laws 4 and 5.

a clear customary pattern to the contrary as Rabbi Meir of Rothenburg stated in the thirteenth century: "In all matters on which the great legal scholars are in dispute I hold that a stringent approach must be followed except when the permissibility of a matter has spread in accordance with the custom of the scholars by whom we have been preceded."⁴⁷

Besides helping to define the law, customs often serve as the source of law. The Rabbis have even claimed that "Custom always precedes law."⁴⁸ The validity of this statement is doubtful, but it is certainly true that many Rabbinic, and even many Biblical, laws had their origins in the customs of the people. Laws such as those requiring circumcision or prohibiting the eating of blood may well have originated in patriarchal days, as the *Bible* records, before the formalization of Jewish practice in a legal code. Many of the stories in *Genesis* assume rules of custom that are only later given legal articulation. For instance, the story of Judah and Tamar⁴⁹ revolves around the laws of levirate marriage which first appear in chapter 25 of *Deuteronomy*.

Of all the instances in which custom affects law, those in which it effectively overrules the law are the most controversial. In Jewish law this situation was legitimized most often and most easily as to secular matters, because then the communal custom was simply an exercise of the freedom of stipulation given to individuals in non-religious affairs. Custom that violated ritual laws was quite another matter, however, because in that area individuals did not have a voice in determining the law. Custom might prohibit what the law permits, but custom could not allow what the law forbids.⁵⁰ Only an express revision of the law by the Rabbis could alter Jewish ritual law to make it more lenient. This principle is stated emphatically

47. *Responsa Maharam of Rothenberg* (ed. Berlin, no. 386).

48. *Soferim* 14:18.

49. *Genesis* 38.

50. MAIMONIDES, *MISHNEH TORAH*, *Shevitat Asor*, 3:3; *Responsa Rosh* 55:10; *Responsa Rashbash* 562. The sentence, "Custom uproots law," occurs only in the *Palestinian Talmud*, *P.T. Bava Metzia* 7:1, 11b; *P.T. Yevamot* 12:1, 12c, but the principle is used in the *Babylonian Talmud* and later codes as well. See M. ELON, *JEWISH LAW* 732-39; M. Elon, *Minhag*, in 12 *ENCYCLOPEDIA JUDAICA* 13-19; A. Guttman, *On the Question of the Relationship between Custom and Law in Talmudic Period*, 7 *Bitzaron* No. 7 at 95-103 (Nisan, 5706), No. 8 at 192-98 (Tammuz, 5706) (in Hebrew).

in the *Talmud* by the rhetorical question, "Does the matter then depend upon custom?"⁵¹

Despite the inability of custom to overrule ritual laws, custom can set aside Jewish secular law. The reason for this ability to affect secular law is clear: the premise upon which Jewish secular law rests is that it applies only as long as the parties do not disclose their preference for an alternative arrangement. If they do, however, their new arrangement becomes binding. Such reasoning holds all the more strongly when an entire community wants to adopt practices at variance with existing secular legislation. Indeed, secular legislation depends upon custom, and therefore "custom can actually nullify the law" in nonreligious affairs, as the *Jerusalem Talmud* explicitly declares.⁵² For example, deeds that are not signed as required by Jewish law are valid if prepared in accordance with local custom.⁵³ Also, debts may be recovered by levying against movable property if local custom permits⁵⁴ even though Talmudic law does not,⁵⁵ and custom may override laws regulating the financial arrangements between husband and wife.⁵⁶

The *Talmud* restricts the power of law even further. It states several times that "we may not make a decree upon the community unless the majority are able to abide by it."⁵⁷ Maimonides spelled out the far-reaching implications of this rule:

If a court enacted a decree, and it seemed to take hold among all Israelites at that time and indeed for many years, but after a protracted period of time another court investigated the practices of all Israelites and found that observance of that decree was not widespread among all of Israel, then the later court has the right to abrogate it, even if it was a lesser court than the first in wisdom and number.⁵⁸

Custom thus affects the formation of law, the degree of its authority, and the conditions under which it is annulled, either de facto or de jure. In this way, as well as in its scope, institutions, enforcement, and legal methodology, Jewish law is very much a legal system in every sense.

51. *Hullin* 63a; *Bava Metzia* 69b-70a.

52. See note 50 *supra*.

53. *Bava Batra* 10:1, 165a.

54. *P.T. Gittin* 5:3, 46d.

55. *Ketubot* 51a, 69b.

56. *Ketubot* 6:3-4.

57. *Bava Kamma* 79b, *Bava Batra* 60b, *Avodah Zarah* 36a, *Horayot* 3b.

58. MAIMONIDES, *MISHNEH TORAH*, Book of Judges, *Laws of Rebels* 2:7.

II. The Religious Element in Jewish Law: The Covenant between God and Israel

In view of the above discussion of Jewish law as a legal system, in what sense is the law religious? That question will be answered by distinguishing among the legislative, executive, and judicial aspects of the law and by examining, in turn, the religious elements of each one.

A. The Religious Influence on the Legislative Functions of Jewish Law

The clearest sense in which Jewish law is religious is in its claim that it articulates the will of God. As was noted previously, the Rabbis maintained that God gave not only the *Written Torah* at Sinai but also the *Oral Torah*, the interpretations that Jews were to develop during all generations to come and even the questions that students were to ask their teachers.⁵⁹ In other words, God revealed both the written text of the *Torah* and the way in which He wanted it interpreted.

From Biblical times not only the leaders but also the people knew the law. Repeatedly, the *Bible*, when introducing a series of laws, says, "And Moses spoke to the Children of Israel." These laws definitely were not a tradition that was kept in the hands of an elite clergy; they were disseminated consciously and pervasively among the masses. Teaching the law to the people is an important task of Biblical religious functionaries.⁶⁰ Furthermore, Jewish law obligates parents to teach the law to their children,⁶¹ and Joshua ben Gamala is renowned in the *Talmud* for having established many

59. See notes 20, 22, 30, 34 *supra*. In other, commonly used terms, the *Midrash* (interpretation) that the Rabbis of the *Talmud* accepted was, in their minds, actually identical to the *Peshat* (the plain meaning of the written text). Only when the medieval Jewish grammarians had done their work did *Peshat* come to denote the meaning of the text itself as distinct from any of its later Rabbinic interpretations. 2 BACHER, *ARKHAI MIDRASH* 269 n.3 (1960); M. KADUSHIN, *THE RABBINIC MIND* 121-30 (1972), reprinted in S. SIEGEL, *CONSERVATIVE JUDAISM AND JEWISH LAW*, [hereinafter cited as SIEGEL]; see R. Loewe, *The Plain Meaning of Scripture in Early Jewish Exegesis*, I Papers of the Institute of Jewish Studies 140-85 (London: Institute of Jewish Studies, 1964).

60. *Deuteronomy* 5:28; 31:19, 22; *Ezra* 7:10; II *Chronicles* 17:7-9.

61. *Deuteronomy* 6:7-9; *Shabbat* 127a; *Kiddushin* 29a-30b (father should teach *Torah* to son); *Shabbat* 119b; *Berakhot* 21(b).

schools to help them fulfill that obligation.⁶² Consequently, the customs of the people could be given legal authority because the people also had heard the word of God.

That Jewish law and Jewish custom are the revealed will of God always has been and continues to be the reason why most religious Jews obey Jewish law. Over the centuries, Jews have proposed a number of other rationales for observing the law, but they usually have been suggested as supplementary motivations for obedience, not as substitutions for revelation.⁶³ In this sense, Jewish law is clearly religious: it is based on the assumption that God is its legislator, however indirectly His will is made known.

In a compelling essay, Simon Greenberg has summarized the reasons why Jewish law, despite all of its human aspects, nevertheless can be understood adequately only as a revealed law.⁶⁴ He points out, first, that Jews have attributed a divine origin to the law because of "their sense of overwhelming awe when they contemplated the grandeur and the majesty of the Law."⁶⁵ Scholars today may question the all-inclusive wisdom of Jewish law, but it is still a feeling that many observant Jews have, and it certainly is part of the religious feeling motivating those who observe Jewish law.⁶⁶

Jews have not only been impressed by the wisdom of the law; they have attached cosmic significance to it. Man is not God, but man is, according to the Rabbis, God's partner in the continuing act of creation. The world was not created in a perfect state. It needs

62. A considerable number of schools existed within Jewish communities in various times and places. See *Bava Batra* 21a; *Bava Metzia* 85b; *Gittin* 58a; *Ketubot* 105a.

63. See, e.g., S. GAON, BOOK OF BELIEFS AND OPINIONS Ch. III, Sects. 2, 3, 5, 6; Y. HEINEMANN, RATIONALES FOR THE COMMANDMENTS IN THE LITERATURE OF ISRAEL, *passim* (1966) (in Hebrew); S. HIRSCH, HOREB clv-clxii (1962); III MAIMONIDES, GUIDE FOR THE PERPLEXED 26.

64. Greenberg, *A Revealed Law*, 19 CONSERVATIVE JUDAISM, No. 1 at 36-50 (Fall, 1964), reprinted in SIEGEL, *supra* note 59, at 175-94. For a less successful argument for the need for revelation, see EMIL FACKENHEIM, QUEST FOR PAST AND FUTURE 66-82 (1968).

65. Greenberg, *A Revealed Law*, 19 CONSERVATIVE JUDAISM No. 1 at 41, reprinted in SIEGEL, *supra* note 59, at 182.

66. Thus each morning during the traditional prayer service, the Jew praises God "for choosing us from all His peoples by giving us His Torah" and exclaims: "Happy are we! How good is our portion! How pleasant our lot! How beautiful our heritage!" Especially articulate expressions of these feelings appear in *Deuteronomy* 4:5-8 and *Psalms* 19 and 119, but there are hundreds of other passages on the same theme in Biblical and Rabbinic literature.

work, and God looks to man to help Him in completing His creation.⁶⁷ In other words, God gives man an opportunity to put a mark on the world and to feel needed. Man fulfills a cosmic role and gives life meaning by obeying God's will as expressed in Jewish law and by contributing to the betterment of the world in as creative a way as possible. Jewish law is thus a vehicle for investing life with direction and purpose; it can be so only, or at least most easily and effectively, if it articulates the will of God.

Finally, a third factor that gives Jewish law its religious nature is the willingness of Jews to make the sacrifices necessary to observe it. The demands of Jewish law are great, and Jews often have been in circumstances that they could have used as justifications for failing to meet those demands. Only the Jews' belief that the law expresses the will of God can explain their persistent observance.

As many modern Jewish philosophers have pointed out, such faith does not require a fundamentalist view of the *Bible* or a propositional view of revelation: Jewish law could be the human record of people's encounters with God, and therefore, be subject to error and change as their encounters with God continue.⁶⁸ Jewish law can retain its coherence and historical ties through such changes if it is not individuals but the Rabbis and an observant community who determine the contents of the law in any age. Jewish philosophers, however, must assert the claim of divine authorship for Jewish law if they are adequately to describe how it functions in the ways enumerated above.

Jewish law is religious in another way as well. It not only represents God's prescriptions for mankind; it also articulates how the Jew tries to reach to God. Specifically, it brings a Jew in contact with the holy and expresses the beliefs and values obtained from such encounters.

The Hebrew word for "holy" means set aside or special. The earliest phenomena described as holy were thought special because they manifested overwhelming power, and this power has remained a significant element in the meaning of the term. In confronting

67. *Genesis Rabbah* 11:6 (11:7 in some editions); *Avot d'Rabbi Natan*, Version II, Ch. 21; cf. *Shabbat* 119b.

68. See, e.g., N. GLATZER, FRANZ ROSENZWEIG: *HIS LIFE AND THOUGHT* 158 (1961); W. HERBERG, *JUDAISM FOR MODERN MAN* Ch. 17 (1951); L. JACOBS, *A JEWISH THEOLOGY* Ch. 14 (1973).

the holy, a Jew becomes aware of self limitations and, in contrast, the awe-inspiring power and expanse of God and His world. From Biblical times, however, the Jewish tradition has linked the term with the important, the just, and the good.⁶⁹

Jewish law calls attention to the holy in those senses and brings the Jew in contact with it. As Abraham Joshua Heschel has said, the Jew does not become aware of God through a process of speculation. That process is the Greek method. Judaism demands "a leap of action rather than a leap of thought."⁷⁰ The Jew is commanded to act in specific ways, whether or not he or she understands the purpose of those commands or feels the impulse to obey them on a given occasion. The regimen of actions is designed to bring the Jew into contact with the realm of the holy so that there is an awareness of the holy in the course of daily pursuits. The requirement that a Jew pray morning, afternoon, and evening, for example, requires stopping in the midst of a busy day for reorientation to one's place in life, values, associations, duties, and goals. In that way the realm of the holy in the sense of "good" can influence what the Jew does frequently and concretely. Similarly, the requirement that a Jew observe a variety of holidays marking the seasons of the year serves to bring the Jew into contact with the rhythms of nature. This requirement is especially important for the urban Jew who often forgets our dependence upon the forces of nature. Renewed contact with the powerful elements of the holy helps to curb the ever-weening human ego, revive feelings of appreciation and thankfulness, and rejuvenate one's zest for life.

Jewish beliefs and values are a response to the experience of the holy. Judaism uses law to introduce cognizance of the holy into daily life, and it also uses law to articulate the beliefs and values that derive from such experiences.

69. See, e.g., *Isaiah* 5:16: "The Lord of hosts shall be exalted in justice, the holy God shall be sanctified through righteousness"; N. SNAITH, *THE DISTINCTIVE IDEAS OF THE OLD TESTAMENT* Ch. 2, 3 (1944).

70. Heschel, *Toward an Understanding of Halachah*, 63 *YEARBOOK OF THE CENTRAL CONFERENCE OF AMERICAN RABBIS* 309; reprinted in SIEGEL, *supra* note 59.

For a discussion of *Keva* (the fixed, legally required actions of Jewish law) and *Kavannah* (the intentions and feelings that ideally accompany such actions), see A.J. HESCHEL, *GOD IN SEARCH OF MAN* 293-331 (1955). It should be remembered, however, that according to classical Jewish thought, the Covenant revealed at Sinai included both the *Written* and *Oral Torahs*.

Professor Louis Finkelstein has aptly described the Mitzvot or commandments of God as "propositions in action." They are "symbols, expressing basic ideas of the *Torah*."⁷¹ Jewish observance is a means by which Jews state, more eloquently than in words, what they believe about themselves and their Jewishness. Thus, the Sabbath is not just a day of rest; it is an assertion that God created the world and a celebration and ceremony of thanksgiving for that creation. The Sabbath is also a declaration of the nature of an ideal life of study, community, and harmony, in which work, loneliness, and conflict no longer exist. The Sabbath is, as the Rabbis said, "a foretaste of the World to Come."⁷²

Jewish law articulates Judaism's view not only of what is but also what ought to be. As Professor Max Kadushin has shown, Rabbinic law and lore are both articulations of the Rabbis' value concepts: "*Haggadah* (lore) made the value concepts vivid, and by means of sermons nurtured and cultivated them. The other product of the Rabbis, *Halakah* (law) prescribed ways for the concretization of the concepts in day-by-day living."⁷³ These value commitments are well summarized by Finkelstein. They consist of

respect for the spiritual, as opposed to the material; for the universal as contrasted with the particularistic; for the permanent, as contrasted with the transient; for the creative, as contrasted with the possessive; for the cooperative, as contrasted with the competitive; for conscious direction, as contrasted with easy drifting; for an awareness of goals, as contrasted with refusal to recognize them.⁷⁴

Examples of these commitments include the Jewish dietary laws which express the Jewish dedication to the sanctity of life, the communal life of the Jewish people, and the avoidance of pain to animals.⁷⁵ Also, the Bar Mitzvah, a ceremony marking male adolescence, highlights the Jewish commitment to learning and religious observance.

71. L. Finkelstein, *Judaism as a System of Symbols*, in L. Bryson, *SYMBOLS AND VALUES: AN INITIAL STUDY* 95 (1954), reprinted in SIEGEL, *supra* note 59, at 204.

72. *Berakhot* 57b; see E. FROMM, *THE FORGOTTEN LANGUAGE* 243-48 (1951).

73. M. KADUSHIN, *THE RABBINIC MIND*, 89, reprinted in SIEGEL, *supra* note 59, at 221.

74. Finkelstein, *Judaism as a System of Symbols*, in L. Bryson, *SYMBOLS AND VALUES: AN INITIAL STUDY* 103 (1954), reprinted in SIEGEL, *supra* note 59, at 212.

75. See Milgrom, *The Biblical Dietary Laws as an Ethical System*, 17 *INTERPRETATION*, No. 3 at 288-301 (July 1963).

The many laws that are primarily attempts to spell out moral demands articulate Jewish values to an even greater extent than the rituals. Examples of these laws are those concerned with buying and selling, the disposition of lost articles, and landlord-tenant relationships.⁷⁶ Jewish law thus functions to express and realize Jewish values, and in that sense also, it is religious.

In all of these ways, the content of Jewish law is religious: it is the will of God in some sense, and it is the vehicle by which Jews express their experience with the holy and their beliefs and values in response to the holy.

The religiousness of Jewish law is expressed most succinctly in the Biblical notion of God's Covenant with Israel. This concept expresses the relationship that is formed when God speaks to Israel and when Israel responds to God. As Professor Jose Faur has pointed out, natural law theories never have been popular among Jews because Judaism is basically a positivistic legal system based upon the Covenant at Sinai. Consequently, no laws outside the Covenant have any authority within Judaism, and no revelation other than the one at Sinai enjoys juridical authority.⁷⁷ Moreover, the Covenant is eternal.⁷⁸ As has been discussed previously, the content of the Covenant is subject to interpretation and modification in each generation through Rabbinic decisions and communal practice. The relationship formed at Sinai between God and the Jewish People is, therefore, an ongoing one because the specific arrangements of any continuing, vital relationship change from time to time. Thus, no matter how the specific provisions of the Covenant are formulated, the Covenantal relationship continues, and it imposes added responsibilities on the People of Israel; in *Amos* the words of God are, "You only have I known of all the families of the earth; therefore I will punish you for all your iniquities."⁷⁹ These added responsibilities

76. Some good expositions of Jewish moral laws are J. AGUS, *THE VISION AND THE WAY* (1966); I. JAKOBOVITS, *JEWISH MEDICAL ETHICS* (1959); and M. KONVITZ, *JUDAISM AND HUMAN RIGHTS* (1972). For a discussion of the meta-ethical questions about the relationship between Jewish law and morality, see M. FOX, *MODERN JEWISH ETHICS* (1975); and Dorff, *The Interaction of Jewish Law with Morality*, 26 *JUDAISM*, No. 4 at 455-66 (Fall 1977). Those questions will not be addressed in this Article. Suffice it to say, however, that Jewish tradition always has considered its values to be an integral part of the Jewish religion. For a powerful statement of this belief, see S. SPIEGEL, *AMOS VS. AMAZIAH* (1957).

77. Faur, *Understanding the Covenant*, 9 *TRADITION* No. 4 at 33-55 (Spring 1968).

78. *Deuteronomy* 7:9, 29:29.

79. *Amos* 3:2.

are ultimately to be adopted by all peoples in the Messianic age,⁸⁰ but in the meantime Israel is to serve as "a light unto the nations."⁸¹

Regardless of the legal trappings of Jewish law, then, it is not simply the product of a specific people, developed according to that people's particular ideology. It is rather the terms of the relationship between God and the Jewish people. As such, Jewish law is a distinctively religious legal code.

B. Religious Influence on the Executive and Judicial Functions of Jewish Law

If God is the legislator of Jewish law, that law embodies special wisdom; if He is the enforcer and judge of Jewish law, it carries special authority because His judgment and enforcement are unerring and inescapable. That Judaism has such tenets may seem obvious to one who has grown up in the Western tradition. These tenets, however, depend on a broader conviction, the belief in God's omniscience and power.

The doctrine of omniscience in Judaism consists of three principles: first, that God knows everything that happened in the past, that is happening in the present, and that will happen in the future;⁸² second, that God's laws maximize the quality of man's life on earth and thus are unquestionably wise and good;⁸³ and third, that God's omniscience also enables Him to be an infallible judge. Together, these three principles mean that God knows a person's innermost thoughts so that a misdeed cannot be hidden from Him.⁸⁴ They also mean that He can appreciate but also condemn not just an act committed or omitted but the person's motive.⁸⁵ Since God's omniscience is complemented by His omnipotence, He can enforce His judgments against any person, however clever or strong, both in this world and in the world to come.

Doctrines such as omniscience and omnipotence serve to motivate obedience, deter improper actions, and call attention to the im-

80. *Isaiah* 2:3.

81. *Id.* 49:6.

82. *Sanhedrin* 90b; *Avot* 3:19; *Genesis Rabbah* 1:4, 6:1.

83. *Deuteronomy* 4:6-8, 32:4; *Psalms* 19:8-10; *Job* 28:20-28.

84. *Genesis Rabbah* 24:1; *Exodus Rabbah* 2:2.

85. E.g., *Berakhot* 17a; *Leviticus Rabbah*, *Vayikra* 3:5; *Sanhedrin* 106b.

portance of motive in moral judgment. The Rabbis certainly wanted to instill such beliefs and reap the behavioral benefits. They were aware, however, of challenges to the Biblical claims of divine judgment and enforcement. In the face of the apparent lapses in God's justice that permitted the wicked to prosper and the good to suffer, the Rabbis tried to uphold the doctrine of divine enforcement by adopting the notion of a World to Come, in which the situation would be readjusted.⁸⁶ They also offered other explanations for these lapses, but sometimes they just admitted that human beings cannot understand the workings of God's justice.⁸⁷ In their most philosophically advanced moments, the Rabbis broke the connection between goodness and reward altogether, claiming that doing the right thing for the sake of reward is not the proper motivation and that the only reward for doing good is the act itself and the impetus that it gives to further moral action.⁸⁸

The Rabbis were nevertheless convinced that God would exercise unerring retributive justice and that the authority of Jewish law depended upon that. Some laws, in fact, were left completely to divine enforcement; they were considered to be totally outside the jurisdiction of human courts.⁸⁹ Even those laws that were within the competence of human judges ultimately would be enforced by God. This tenet is so central to the Jewish philosophy of life that the Rabbis defined a heretic as one who claims that "there is no justice and no Judge."⁹⁰ For Judaism, God is the final arbiter and enforcer of Jewish law.

Secular law includes a few remnants from religious legal systems of the notion that God is the ultimate judge. One example is the oath once administered in American courts "to tell the truth, the whole truth, and nothing but the truth, so help me God." Because of the difficulty of determining who is telling a lie, American law

86. *Pesahim* 50a; *Avot d'Rabbi Nathan*, ch. 28; *Midrash to Psalms* 1 (12b) 121 (120a); *Eruvin* 19a; *Rosh Hashanah* 16b. For an explanation of Rabbinic dicta about life after death, see A. COHEN, *EVERYMAN'S TALMUD* ch. 11 (1949).

87. For a summary of the various approaches that the Rabbis took on this issue, see A. COHEN, *EVERYMAN'S TALMUD* 110-20 (1949).

88. *Avot* 4:2; cf. 1:3.

89. These laws included those in the Bible that prescribe excommunication imposed by God, e.g., *Exodus* 12:15, :19; *Leviticus* 7:20-27; 17:14; 18:29, 20:17, 20:18, 22:3; *Numbers* 15:31.

90. *Genesis Rabbah* 26:6.

invoked God's name to ensure that the oath taker spoke the truth. As with secular courts, Jewish law does not leave everything to God. Jewish courts administer a variety of remedies to ensure truth, including penalties for perjury. Nevertheless, God's role in judging human actions and in rewarding or punishing them is a more prominent feature of the Jewish legal system than of the secular law, both in theory and in the consciousness of those persons who obey it. This fact makes Jewish law a distinctively religious legal system.

God is also involved in the enforcement of Jewish law in another way, one that is worthy of emphasis because classical Christian texts often ignore or distort this feature of Jewish law. God is not just the stern judge and policeman in Judaism. On the contrary, He serves primarily as a covenanted partner, father, provider, and guardian for Israel. Consequently, the major relationship of Israel to God is not marked by fear, but rather by love. In the realm of law, this relationship means that obedience is motivated primarily and preferably by love of God.⁹¹ Indeed, the commandments are considered to be manifestations of God's love for Israel, and their observance is an expression of Israel's love for God; as such they are the source of merit, beauty, and joy.⁹² Because Jewish law articulates the rules of the covenanted relationship between God and Israel, it can evoke these feelings of love for God and can use them to motivate obedience of His commandments. God only relies on fear of His power as a stimulus for obedience when this motivation fails. Secular law may be able to call upon feelings of patriotism in a like way, especially in time of national crisis, but it usually does not stimulate positive commitment to the law as intensely or pervasively as religious law does. This disparity in commitment occurs because people do not feel the same closeness to the other citizens of their nation that members of a religion feel to God. Jewish law is clearly and consciously the most important bridge from the Jew who observes Jewish law to both his people and his God. He therefore observes it more often out of a sense of joy than from feelings of obligation. Thus, Jewish law is as religious in its enforcement as it is in its content because God is seen as the judge, enforcer, and partner in His covenant with Israel.

91. See *Deuteronomy* 6:4-9, :14-15; 10:20-11:1; *Sotah* 31a.

92. *Makkot* 3:16; *Song of Songs Rabbah* 1:15; *Midrash Psalms* 100:2, 119:97.

III. The Practical Effects of the Jewish Religion on Jewish Law

Because Jewish law grows out of the Jewish religious experience and because it continues to be a distinctly religious legal system in the ways discussed above, the Jewish religion affects it in a number of practical ways. Therefore, some of the major influences of the religion on the law should be examined.

Communities develop rituals, but religious communities do so more often than most others. In part, the reason for this difference is that religions express man's ultimate commitments, worst fears, greatest joys, deepest desires, and most troublesome doubts, and for such feelings, detached, expository prose simply will not suffice. Consequently, religions use poetry, art, and music extensively, and they go beyond verbal and visual expression by creating rituals, which require the active participation of the devotee in a kind of poetry in motion. Judaism is no exception; it has many rituals. The details of these rituals are found in the law. In fact, more than half of the legislation in the *Mishnah* concerns what normally would be called rituals.⁹³ Thus one important influence of Judaism on Jewish law is the extent to which the law is concerned with ritual practices.

Jews have lived under foreign domain for much of their history and have had to accommodate themselves to the laws of many realms. The third century jurist, Samuel, laid down the rule in secular matters "the law of the land is the law,"⁹⁴ thus effectively nullifying the authority of a large part of Jewish law. Nevertheless, during much

93. Mordecai Kaplan argues that the ritual laws should be called "folkways" rather than "Mitzvot" (commandments). He proposes this label because he does not believe the ritual laws have a supernatural origin. To him they are "the social practices by which a people externalizes the reality of its collective being." M. KAPLAN, *JUDAISM AS A CIVILIZATION* 432 (1957). Kaplan, however, maintains that Jewish folkways are both religious and cultural and that religious elements often play a role in even the predominantly cultural Jewish folkways. Jacob Agus has argued for the religious character of Jewish rituals even more forcefully. He claims that the authority of Jewish rituals in the past, present, and future cannot be explained or justified in nationalistic or ethnic terms alone. Agus states that, although the form of Jewish rituals may be shaped by such forces, only the fact that they express religious convictions can explain their authority. Agus, *Laws as Standards—The Way of Takkanot*, 7 CONSERVATIVE JUDAISM No. 4 at 8-26 (May 1950), reprinted in SIEGEL, *supra* note 59, at 28-45. Thus, the proliferation of ritual laws in Jewish law is clearly the result of its religious origins and context and not simply an ethnic expression.

94. *Gittin* 6b.

of the Middle Ages, Jews maintained and enforced Jewish secular law in their dealings with other Jews. No doubt part of the reason was that they could not expect justice in the gentile courts; but another factor was their conviction that Jewish law is the word of God and that God's authority extends to all times and places. The adherence to Jewish law lessened, however, after the Enlightenment, because Jews could expect fair treatment in the courts of Western Europe and the United States and also because they became less committed to Judaism.

Because Jews no longer follow Jewish law in secular matters, Mordecai Kaplan maintains that it can have no authority in the modern world unless and until the Jewish community reconstitutes itself as a vital, voluntary subgroup within the larger community. Kaplan further argues that after this reconstitution the Jewish community must create laws to govern Jewish communal activities, domestic relations, and ritual practices as a supplement to the law of the land.⁹⁵ On the other hand, Robert Gordis claims that Jewish law still is authoritative because of its divine enforcement.⁹⁶

Whatever the assessment of Jewish law today, its religious character gave it authority throughout the Middle Ages when it was in conflict with the secular law and it is that character that may give it authority today.

The relationship between religion and morality is complex and far beyond the scope of this Article. Suffice it to say that morality is a primary concern of the Western religions. The relationship between law and morality is no less complex.⁹⁷ Nevertheless, Judaism attempts to treat moral issues in legal terms, and the religious context of Jewish law makes it especially hospitable to moral concerns and methods.

Jewish law treats most of the same matters as any secular legal system. Unlike the secular law, however, it deals with many strictly moral and personal issues as well. For example, after listing a number of laws concerning fraud, the *Mishnah* proclaims that there is

95. M. KAPLAN, *THE FUTURE OF THE AMERICAN JEW* (1948); M. KAPLAN, *QUESTIONS JEWS ASK* 231-32, 263-76 (1956).

96. R. Gordis, *Authority in Jewish Law*, *PROCEEDINGS OF THE RABBINICAL ASSEMBLY* at 77 (1941-1944) reprinted in SIEGEL, *supra* note 59, at 62.

97. For a good discussion of the relationship between law and morality, see W. FRIEDMANN, *LEGAL THEORY* (1967).

fraud in words as well as in deeds: "One must not ask another, 'What is the price of this article?' if he has no intention of buying. If a man was a repentant sinner, one must not say to him, 'Remember your former deeds.'"⁹⁸ Similarly, although Jewish law requires an actual transfer of movable property to the buyer before the buyer is bound to perform his end of a bargain, it recognizes stages before that event in which there are varying degrees of moral obligation to carry the agreement through.⁹⁹ Finally, Jewish codes from the time of the *Bible* contain considerable legislation concerning judicial ethics, another example of the early and persistent interest of Jewish law in moral issues.¹⁰⁰

This interest extends to personal matters as well. Thus, the *Mishnah* includes a tractate solely devoted to moral maxims,¹⁰¹ and Maimonides' law code, the *Mishneh Torah*, contains a book on correct theological ideas and another on using the Golden Mean as a general approach to life. Even the most intimate areas are not beyond the scope of Jewish law. The *Mishnah* goes into considerable detail about the obligations of husband and wife to each other in marriage, even specifying how often a man must offer to have sex with his wife.¹⁰² By contrast, the California Civil Code contains just one reference to marital obligations: "Husband and wife contract toward each other obligations of mutual respect, fidelity, and support."¹⁰³ This concern of Jewish law with matters generally outside the scope of legislation can be explained by the fact that God is considered its author and therefore nothing falls outside of its jurisdiction.

The religious element of Jewish law is also evident in the extent to which Jewish law relies on moral inducements for its enforcement. Jewish courts inflicted penalties, but many laws did not prescribe human remedies. Instead, improper actions were often described as "free from penalty but forbidden,"¹⁰⁴ "unpunished in human law,

98. *Bava Metzia* 4:10.

99. *Id.* 4:1; see *id.* 48b-49b.

100. *Deuteronomy* 1:16-17; 16:18-20. For a good summary of the earlier Talmudic material on this subject, see MAIMONIDES, *MISHNEH TORAH*, *Laws of Courts (Sanhedrin)*, Chapters 20-24.

101. *Ethics of the Fathers (Avot)*.

102. *Ketubot* 5:5-6:1; 7:1-7:6; 8:1.

103. CAL. CIV. CODE § 5100 (West 1970).

104. *Shabbat* 3a, 11b, 30a, 47a.

but guilty by Divine law,"¹⁰⁵ or, in less serious cases, "not in keeping with the spirit of the sages"¹⁰⁶ or "not an act that an Israelite does."¹⁰⁷ For example, even though the Rabbis legally could not force a rich man to give to charity or to support his daughters during his lifetime, they could embarrass him publicly if he refused because these obligations were considered to be moral ones.¹⁰⁸

Moral persuasion also was used in Jewish law to provide positive reinforcement, and this use was made much more frequently and unselfconsciously than in the common law. The Jew was expected to act "beyond the requirements of the law," as the *Talmud* often asserts.¹⁰⁹ Jewish religious literature was used extensively to induce a person to act in such a way. In fact, the law functions in the context of a large body of religious literature called the *Aggadah*, which consists of legends, plays on words, fables, and stories the Rabbis used to interpret the *Bible*. The Rabbis consciously created this literature "to draw people's hearts to Jewish commitment in thought, word and deed."¹¹⁰ In this way, they anticipated modern discussions of moral theory that emphasize the role of ideals, vision, and imagination in moral motivation.¹¹¹ Therefore, religious literature, together with other modes of moral education and expression in Judaism, enables Jewish law to rely heavily on moral enforcement.

Human actions involve a complex combination of factors, including physical action, motive, and intent. Because of the privacy of the human mind, most legal systems must determine the motive and intent of an individual by observing his actions. As a result, in many areas of law the judgment considers only the physical act. Jewish law also follows this practice with respect to the laws that are administered by human courts. God's omniscience, however, allows Him to know the innermost thoughts of man, and therefore

105. *Bava Kamma* 6:4; *Tosefta Shevot* 3:1-2.

106. *Tosefta Bava Metzia* 3:7.

107. *Bava Kamma* 94b, *Bava Metzia* 48b.

108. See *Ketubot* 49a-49b.

109. See, e.g., *Bava Metzia* 30b, where Rav Yohanon asserts that Jerusalem was destroyed because its inhabitants "based their judgments solely on *Torah* law and did not act beyond the requirements of the law."

110. *Yoma* 75a.

111. See, e.g., J. McCLENDON, JR., *BIOGRAPHY AS THEOLOGY* (1974); Hepburn & Murdoch, *Vision and Choice in Morality*, 30 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 14-58 (Supp. 1956), reprinted in I. RAMSEY, *CHRISTIAN ETHICS AND CONTEMPORARY PHILOSOPHY* (1966); J.O. URMSON, *Saints and Heroes*, in A.I. MELDEN, *ESSAYS IN MORAL PHILOSOPHY* (1958).

His judgment can take motive and intention into account as easily as physical acts.¹¹² The religious context of Jewish law thus enables it to treat human actions much more fully than nonreligious systems can in that it can account for elements of motive and intent as well as physical action.

Epilogue

Jewish law is a religious legal system. It functions in some ways like any other body of law, but in other ways it is distinctively religious. The religious elements have a far-reaching effect on Jewish law, and the law in turn affects the religion. Through these interactions Jews believe that Jewish law becomes "a tree of life to them who hold fast to it, and all who uphold it are blessed; its ways are ways of delight, and all its paths are peace."¹¹³

112. Nevertheless, even if God considers thoughts when making his judgments, he is merciful. He rewards people who intend to do the right thing even if they do not succeed, and He punishes them only if they intended to commit the wrong that they did. *Rosh Hashanah* 28b; *Midrash Psalms* on Ps. 30; cf. *Kiddushin* 40a and *Tosefta, Peah* 1:4.

113. *Proverbs* 3:17-18 (used with reference to the *Torah* in synagogue service); see P. BIRNBAUM, *DAILY PRAYER BOOK* 128 (1949).